Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 80-690

# In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD G. HATTEN, ET AL., PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

**MEMORANDUM FOR THE RESPONDENT IN OPPOSITION**

WADE H. MCCREE, JR.
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Petitioners seek review of the court of appeals' dismissal of thier appeals from an order of the United States Tax Court consolidating their cases for trial with that of another taxpayer who was a participant in a transaction giving rise to one of the issues in litigation (Pet. 13-15).

The court of appeals correctly held that it had no jurisdiction to consider petitioners' appeal from the Tax Court's consolidation order. The jurisdiction of the courts of appeals to review actions of the Tax Court is limited by statute. Section 7482(a) of the Internal Revenue Code of 1954 (26 U.S.C.) grants to the courts of appeals jurisdiction "to review the decisions of the Tax Court," and Section 7459(c) indicates the content of the term "decision" as "an

order specifying the amount of the deficiency." As the Second Circuit held almost 50 years ago in *Michael* v. *Commissioner*, 56 F.2d 825 (1932), under parallel provisions then relating to the Board of Tax Appeals, the courts of appeals have jurisdiction to review only such "decisions" of the Tax Court (then the Board of Tax Appeals), and not intermediate or interlocutory orders.[1]

In a consistent line of decisions arising under the intervening Revenue Acts and under the Internal Revenue Codes of 1939 and 1954, the courts of appeals have uniformly held that there is jurisdiction in the courts of appeals to review on appeal only those "decisions" of the Tax Court (or, prior to the enactment of Section 504 of the Revenue Act of 1942, ch. 619, 56 Stat. 798, of the Board of Tax Appeals) that determine the amount of a deficiency or that, by statute, are to be considered as such decisions. See, *e.g.*, *Wilson* v. *Commissioner*, 564 F.2d 1317, 1318 (9th Cir. 1977); *Ceco Steel Products Corp.* v. *Commissioner*, 150 F.2d 698 (8th Cir. 1945); *Kiker* v. *Commissioner*, 218 F.2d 389 (4th Cir. 1955); *Commissioner* v. *Smith Paper, Inc.*, 222 F.2d 126 (1st Cir. 1955); *Commissioner* v. *S. Frieder &*

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[1]The 1954 Code expressly assimilates certain other dispositions of proceedings by the Tax Court as "decisions" for purposes of Section 7482(a). Section 7459(d) provides that a decision dismissing a proceeding shall be considered a decision that the deficiency is the amount determined by the Secretary, and Section 7459(e) provides that if assessment or collection is barred by the statute of limitations, a decision of the Tax Court to that effect shall be considered a decision that there is no deficiency. Indeed, in giving the Tax Court limited jurisdiction to make declarations with respect to charitable organizations (Section 7428), certain retirement plans (Section 7476), and the status of certain governmental obligations (Section 7478 (Supp. III)), Congress carefully provided in each instance that such a declaration shall have the force and effect of a decision of the Tax Court, "and shall be reviewable as such." See Sections 7428(a), 7476(a), 7477(a), and 7478(a).

*Sons, Co.*, 228 F.2d 478 (3d Cir. 1955); *Handshoe* v. *Commissioner*, 252 F.2d 328 (4th Cir. 1958); *Licavoli* v. *Commissioner*, 318 F.2d 281 (6th Cir. 1963); *Ryan* v. *Commissioner*, 517 F.2d 13 (7th Cir.), cert. denied, 423 U.S. 892 (1975) *W. W. Windle Co.* v. *Commissioner*, 550 F.2d 43, 45 (1st Cir.), cert. denied, 431 U.S. 966 (1977); 9 J. Mertens, *Law of Federal Income Taxation*, 51.13 (1977).[2] Since the Tax Court's consolidation order did not determine the amount of the deficiency, the court of appeals properly dismissed the case for lack of jurisdiction.

In seeking to avoid the applicable jurisdictional limitations, petitioners invoke (Pet. 11-13) the "collateral order" doctrine of *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949). But *Cohen* and the "collateral order" doctrine have no relevance here. The question in *Cohen* related to the finality, for purposes of 28 U.S.C. 1291, of the order in question. As the court noted in *Michael* v. *Commissioner*, *supra*, 56 F.2d at 826, the first question with respect to appeal from an order of the Tax Court is whether the order in question is a "decision" of the Tax Court, not whether it is final. Here, the Tax Court's consolidation order was not a decision. Hence, the court of appeals had no jurisdiction to review that order under Section 7482(a) of the Code.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
*Solicitor General*

DECEMBER 1980

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[2]The phrase in Section 7482(a) assimilating review of Tax Court decisions to review of district court decisions relates to scope of review, not to jurisdiction. *Commissioner* v. *Smith Paper, Inc.*, *supra*, 222 F.2d at 128.